CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923

No. 741. 169

THE NEW YORK CENTRAL RAILROAD COMPANY

vs.

THE UNITED STATES OF AMERICA.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

FILED DECEMBER 18, 1922.

(29,291)



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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 11, 1923.

1 In the United States Circuit Court of Appeals for the Third Circuit.

THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff-in-Error,

vs.

UNITED STATES OF AMERICA, Defendant-in-Error.

In Error to the District Court of the United States for the Western District of Pennsylvania.

Before Buffington, Woolley, and Davis, Circuit Judges.

Certificate to the Supreme Court.

In order to be guided to a proper decision of the controversy appearing upon this record, the Circuit Court of Appeals for the Third Circuit desires the instruction of the Supreme Court, and accordingly certifies, under Section 239 of the Judicial Code, a question of law arising from the following facts:

The United States brought this action against The New York Central Railroad Company, a common carrier by railroad engaged in interstate commerce in the State of Pennsylvania, with a line of railroad extending from points in Ohio to Buffalo, New York, to recover penalties prescribed by the Act of March 2, 1893, (27 Stat. L. 531), as amended by the Act of March 2, 1903, (32 Stat. L. 943), commonly called the Safety Appliance Acts, for an alleged violation of the said Acts and the Order of the Interstate Commerce Commission of June 6, 1910, made pursuant thereto, in that the defendant, in the year 1920, operated on its said line of railroad two freight trains, one consisting of 63 cars, and the other of 80 cars, all being equiped with power or train brakes, when three cars in each
2 train, because their power brakes became out of order, did not have their power or train brakes used and operated by the engineer of the locomotive drawing the train, although they were coupled with the other 60 and 77 cars respectively, and were cars equipped with power brakes.

The defendant admitted that each of the said three cars in each train was equipped with power or train brakes, but denied that at the particular times and in the particular movements involved, they or either of them were power-braked cars within the meaning of the said acts and order of the Interstate Commerce Commission made thereunder, or were associated together with the other 60 and 77 cars.

Upon the trial a jury was waived and the facts were stipulated.

The trial court entered judgment against the defendant for the penalties claimed, upon findings of fact, of which the following bear on the question to be submitted:

"The train mentioned in the first cause of action, consisting of a locomotive and sixty-three cars, was made up at Coalburg, Ohio, a station on defendant's lines, from which it departed at 8.20 P. M. on November 10, 1920; and was run via Erie, Pennsylvania, to Buffalo, New York, where it arrived at 9.40 P. M. on November 11, 1920.

Before leaving Coalburg all the air brakes and air-brake appliances were inspected and tested by competent inspectors, and were in proper working order when said train departed, at which time the air brakes on all said cars could be and were used and operated by the engineer of the locomotive drawing said train.

Some time after leaving Coalburg the air-brakes on the following cars in said train: IC 94320, PRR 324220 and B&O 221591, became out of order from causes unknown, so that they could not be effectively used and operated. Because of the liability of said brakes to stick and cause delay and damage to the train, the trainmen cut them out from their connection with the line of air hose extending from the locomotive to the end of the train, by turning the cut-out cocks in the cross-over pipes. This made it impossible for the engineer to use or operate the brakes on said three cars to control the speed of the train, but did not interfere with his use or operation of the brakes on said sixty other cars, which he did use and operate independently of the brakes on said three cars, and thereby controlled the speed of said train without requiring brakemen to use the common hand brakes for that purpose.

All of the said sixty-three (63) cars in said train were equipped with power or train brakes, and the said three cars that had their brakes cut out were the tenth, fortieth and forty-fourth cars respectively, in said train, counting from the head-end thereof. That said train upon its arrival at Erie, in the State of Pennsylvania, had its locomotive and caboose removed and another locomotive and caboose attached and left Erie at 12.10 P. M. on November 11, 1920, in the condition stated above.

In this condition said train proceeded to Buffalo, passing through Erie, Pennsylvania, where defendant had repairmen and materials available for the repair of said defective brakes."

The findings of fact with respect to the train of 80 cars were identical with the foregoing, except as to point of origin, number and initials of cars.

3 Upon the foregoing facts the United States contends that the said three cars in each train were power-braked cars within the meaning of said acts and were associated with the other 60 and 77 cars respectively, while the defendant contends that the said three cars, when their brakes were cut out as set forth in the findings, ceased to be power-braked cars within the meaning of the said acts, and also ceased to be associated with the other 60 and 77 cars respectively, and that the provisions of said acts and order of the Interstate Commerce Commission have no application to the case.

The question of law growing out of the foregoing facts on which the Circuit Court of Appeals desires the instruction of the Supreme Court is this:

May an interstate carrier lawfully operate a car equipped with power brakes past an available repair station to destination when its power brakes, becoming out of order in transit, have been cut out of the power brake system of the train and when more than eighty-five per centum of the remaining cars of the train are equipped with power brakes controlled by the engineer of the locomotive?

JOS BUFFINGTON,
VICTOR B. WOOLLEY,
J. WARREN DAVIS,
Circuit Judges.

Endorsements: 2901. Certificate of Question for Supreme Court. Received & Filed Dec. 5, 1921. Saunders Lewis, Jr., Clerk.

4 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, sct:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original Certificate of Question for Supreme Court in the case of: The New York Central Railroad Co., Plaintiff in Error, vs. United States of America, Defendant in Error, No. 2901, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this sixth Day of December in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the United States the one hundred and forty-seventh.

[Seal of the United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, Jr.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

Endorsed on cover: File No. 29,291. U. S. Circuit Court of Appeals, Third Circuit. Term No. 741. The New York Railroad Company vs. The United States of America. Filed December 18th, 1922. File No. 29,291.

No. 7[redacted]169

SEP 12
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In the Supreme Court of the United States

OCTOBER TERM, 1922.

THE NEW YORK CENTRAL RAILROAD COMPANY,

vs.

THE UNITED STATES OF AMERICA.

BRIEF OF THE NEW YORK CENTRAL RAILROAD COMPANY.

REED, SMITH, SHAW & MCCLAY,
S. H. WEST,
Attorneys for The New York Central Railroad Company.

No. 741.

In the Supreme Court of the United States

October Term, 1922.

The New York Central Railroad Company,

vs.

The United States of America.

BRIEF OF THE NEW YORK CENTRAL RAILROAD COMPANY.

Reed, Smith, Shaw & McClay,
S. H. West,
Attorneys for The New York Central Railroad Company.

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No. 741.

In the Supreme Court of the United States

OCTOBER TERM, 1922.

THE NEW YORK CENTRAL RAILROAD COMPANY,

vs.

THE UNITED STATES OF AMERICA.

BRIEF OF THE NEW YORK CENTRAL RAILROAD COMPANY.

STATEMENT.

Under favor of Section 239 of the Judicial Code the Circuit Court of Appeals for the Third Circuit has certified to this Court for instruction as to its proper decision, the following question of law:

> "May an interstate carrier lawfully operate a car equipped with power brakes past an available repair station to destination when its power brakes, becoming out of order in transit, have been cut out of the power brake system of the train and when more than eighty-five per centum of the remaining cars of the train are equipped with power brakes controlled by the engineer of the locomotive?"

As the certificate shows, the question arose in the course of an action brought by the United States against the New York Central Railroad Company to recover penalties for the alleged violation of the Safety Appliance

Act of March 2, 1893 (27 Stat. L. 531), as amended by the Act of March 2, 1903 (32 Stat. L. 943), and of the order of the Interstate Commerce Commission of June 6, 1910, made pursuant thereto.

In said action the government charged that in 1920 the defendant operated on its interstate railroad from points in Ohio to Buffalo, N. Y., two freight trains, one of 63 cars and the other of 80 cars, all of which were equipped with power or train brakes, when three cars in each train, because their power brakes became out of order, did not have such brakes used and operated by the engineer of the locomotive drawing the train, although said three cars were coupled with the other cars in the train. The defendant admitted that each of the said three cars in each train was equipped with power or train brakes, but denied that at the particular times and in the particular movements involved they or either of them were power-braked cars within the meaning of the said acts and order of the Interstate Commerce Commission, or were associated together with the other cars. Trial by jury was waived and the facts stipulated, whereupon the trial court entered judgment against the defendant for the penalties claimed upon findings of fact, of which the following appear in the certificate to this Court:

> "'The train mentioned in the first cause of action, consisting of a locomotive and sixty-three cars, was made up at Coalburg, Ohio, a station on defendant's lines, from which it departed at 8:20 P. M. on November 10, 1920; and was run via Erie, Pennsylvania, to Buffalo, New York, where it arrived at 9:40 P. M. on November 11, 1920.
>
> "'Before leaving Coalburg all the air brakes and air-brake appliances were inspected and tested

by competent inspectors, and were in proper working order when said train departed, at which time the air brakes on all said cars could be and were used and operated by the engineer of the locomotive drawing said train.

"'Some time after leaving Coalburg the air brakes on the following cars in said train: I. C. 94,320, P. R. R. 324,220 and B. & O. 221,591, became out of order from causes unknown, so that they could not be effectively used and operated. Because of the liability of said brakes to stick and cause delay and damage to the train, the trainmen cut them out from their connection with the line of air hose extending from the locomotive to the end of the train, by turning the cut-out cocks in the cross-over pipes. This made it impossible for the engineer to use or operate the brakes on said three cars to control the speed of the train, but did not interfere with his use or operation of the brakes on said sixty other cars, which he did use and operate independently of the brakes on said three cars, and thereby controlled the speed of said train without requiring brakemen to use the common hand brakes for that purpose.

"'All of the said sixty-three (63) cars in said train were equipped with power or train brakes, and the said three cars that had their brakes cut out were the tenth, fortieth and forty-fourth cars respectively, in said train, counting from the head-end thereof. That said train upon its arrival at Erie, in the State of Pennsylvania, had its locomotive and caboose removed and another locomotive and caboose attached and left Erie at 12:10 P. M. on November 11, 1920, in the condition stated above.

"'In this condition said train proceeded to Buffalo, passing through Erie, Pennsylvania, where defendant had repairmen and materials available for the repair of said defective brakes.'

"The findings of fact with respect to the train of 80 cars were identical with the foregoing, except as to point of origin, number and initials of cars."

It is the contention of the railroad company that when the brakes on the three cars in each of the trains involved became inoperative under the circumstances disclosed in the foregoing findings of fact, such cars ceased to be "power-braked" cars within the meaning of the said acts of Congress and order of the Interstate Commerce Commission; and further that their movement in that condition through Erie, Pa., an available repair station, was not unlawful.

STATUTES.

Act of March 2, 1893 (28 Stat. L. 531):

"Sec. 1. That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose."

Act of March 2, 1903 (32 Stat. L. 943):

"Sec. 2. That whenever, as provided in said Act, any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train

which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said Act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section."

Act of April 14, 1910 (36 Stat. L. 298):

"Sec. 4. That any common carrier subject to this Act using, hauling, or permitting to be used or hauled on its line any car subject to the requirements of this Act not equipped as provided in this Act shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered as provided in Section 6 of the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six; *provided*, that where any car shall have been properly equipped, as provided in this Act and the other Acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by Section Four of this Act or Section Six of the Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, if such movement is necessary to make such repairs and such repairs can not be made except at such repair point. * * *"

"Sec. 5. That except that, within the limits specified in the preceding section of this Act, the movement of a car with defective or insecure equipment may be made without incurring the penalty provided by the statutes, but shall in all other respects be unlawful, nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States attorney from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three; and, except as aforesaid, all of the provisions, powers, duties, requirements, and liabilities of said Act of March second, eighteen hundred and ninety-three, as amended by the Acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, shall apply to this Act."

On June 6, 1910, the Interstate Commerce Commission issued its order under Section 2 of the Act of March 2, 1903, in which it required that on and after September 1, 1910, not less than eighty-five per cent. of the cars in trains on interstate railroads shall have their brakes used and operated by the engineer of the locomotive, and all power-braked cars in any such train which are associated together with the eighty-five per cent. shall have their brakes so used and operated.

ARGUMENT.

I.

The Three Cars in Each of the Trains Involved Were Not "Power-braked" Cars, and as there Remained in Each Train More Than Eighty-five Per Cent. of Cars Having Their Brakes Operated by the Engineer, the Law Did Not Require the Brakes on said Three Cars to be Also so Used and Operated.

We are not dealing with an omission to have eighty-five per cent. of the cars composing the trains equipped with air brakes, operated by the engineer. The offense alleged is the failure to comply with this portion of Section 2 of the Act of March 2, 1903:

> "And all power-braked cars in such train which are associated together with said fifty" (now 85) "per centum shall have their brakes so used and operated."

And the proper answer to the question propounded depends upon the construction of this clause.

The government contends and the trial court held that the term "power-braked cars" means cars equipped with power or train brakes, regardless of whether the brakes can be operated or not. And that the command "shall have their brakes so used and operated" applied to a car whose brakes are inoperable, is not to be taken literally, but is really intended by indirection, to forbid the movement of the car.

The contention of the defendant is that the term "power-braked cars" means cars equipped with power or train brakes which, in their then condition, may be used and operated by the engineer of the locomotive. The brakes must be usable and operable, in which event they shall be "so used and operated."

In *Bate Refrigerating Co. vs. Salzberger*, 157 U. S. 1, this Court at p. 33 quotes with approval the following from the opinion in *Edison Electric Light Co. vs. United States Electric Light Co.*, 35 Fed. 134:—

> "It is not only the safer course to adhere to the words of a statute construed in their ordinary import, instead of entering into any inquiry as to the supposed intention of Congress, but it is the imperative duty of the Court to do so."

The words "power-braked cars" taken in their ordinary sense, mean cars controlled, or which may be controlled, by power brakes, as distinguished from hand brakes. And such control can only be secured by a brake in working order.

The state of the law at the time the words in question were first introduced supports this construction. The Act of 1893 did not employ the term "power-braked cars," but Section 1 defined an unlawful train as one

> "that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose."

This required that the "sufficient number" of cars be equipped with power or train brakes in operable condition, for only with such brakes could the engineer control the speed of the train.

Therefore, when the Act of March 2, 1903, came to be passed it was not necessary to employ the terms found in Section 2 thereof, that the brakes on not less than fifty per centum of the cars shall be used and operated by the engineer, to prevent the inclusion in said per centum of cars having defective brakes. The law already prohibited such inclusion.

Said section of the amendatory act begins thus:—

> "That whenever, as provided in said act any train is operated with power or train brakes"

It assumes that trains will be operated as provided in the Act of 1893, that is, having a sufficient number of cars equipped with operable brakes. Of them it requires that

> "Not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per cent. shall have their brakes so used and operated;"

This is the first time we find any mention of cars carrying air-brakes in excess of the required minimum. The amendatory act deals with them precisely as it deals with the fifty per centum. Of both it says that they shall have their brakes used and operated by the engineer of the locomotive. This means exactly what it says. It makes it the duty of the engineer to use the brakes on every car thus mentioned, and forbids the trainmen to disable them by cutting them out. It makes unlawful the practice condemned in *Virginian Railway Co. vs. United States*, 223 Fed., 748. Some parts of the railroad were new, and it was unsafe to run a train of one hundred cars controlled exclusively by the power brakes over them, at the extremely slow speed required. They would either stop, or in the effort to maintain movement, the cars would break apart. An order was issued by the carrier that such trains should be controlled at these points by hand brakes alone. The Circuit Court of Appeals for the Fourth Circuit held that under the provisions of the Act of 1893 and the amendatory act of

1903, this practice was illegal, and that a railroad company has no right in moving a train fully equipped with air-brakes in working order, to omit to use them.

It is possible that under a proper construction of Section 1 of the Act of 1893 standing alone, the engineer was required to use the brakes on the "sufficient number" of cars equipped therewith found in his train. But it was only by implication, if at all; and the implication did not extend to all the cars so equipped, but only to such portion as would be ample to control the train. For example, under that Act, if in a train of eighty cars, sixty were equipped with operable air brakes, all connected with the air line, the trainmen could lawfully use the brakes on thirty-five such cars and cut the others out, if the train could thus be controlled. So that it was consistent for the Congress, desiring in 1903 to remove any doubt on the subject, and especially to cover every car in the minimum percentage, to expressly provide in Section 2 of the amendatory act that the brakes on all cars in such percentage should be used and operated by the engineer.

There is no implication in the act of 1893 that the power brakes found on the excess cars over the minimum per cent. fixed by Congress or the Commission, must be used by the engineer. For this excess is first mentioned in the Act of 1903, and is clearly *in addition* to the number of air-braked cars necessary to be used to control the train. It resulted that when Congress determined to make the use of the air brakes on such excess, that is on the power-braked cars associated with the minimum percentage mandatory, it could only do so by express provision, such as is contained in Section 2.

We find then a real and not a simulated or imaginary mischief in the law, in that prior to 1903 it did not expressly require the use of operable brakes which experience showed could and should be used to control the train. That omission was cured and intended to be cured, and nothing else was intended, by the command of the amendatory act that all cars, either in the minimum percentage or among any power-braked cars associated therewith, must have their brakes used and operated by the engineer.

Coming to the description of the cars that must have their brakes so operated—which is the important question—we find that the minimum percentage according to the Act of 1893, is made up of cars

> "so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand-brake for that purpose."

This language is not in any way modified by Section 2 of the Act of 1903. In said section the excess over the minimum percentage, which immediately concerns us, is thus described:—

> "All power-braked cars in such train which are associated together with said fifty per centum."

Here the term "power-braked cars" is used for the first time. Its ordinary import is cars controlled by power, as distinguished from hand brakes; and reading the acts in *pari materia* we find nothing to change such meaning. Taken in the connection in which it is found, the term "power-braked cars" must be regarded as a brief, concise description of the same sort of cars, equipped in the same manner, as those described at length in Section 1 of the Act of 1893.

As we have shown that cars equipped with power brakes do not satisfy such description, unless such brakes are in working order, it follows that "power-braked cars" to be such, must not only be equipped with power brakes, but with operable power brakes.

At the time the law is claimed to have been violated, the brakes on the six cars in question were not in order. It is stated in the finding of facts that although in perfect condition when the trains left their Ohio terminals, they later

> "became out of order from causes unknown, so that they could not effectively be used and operated."

It was then that the trainmen cut them out, because of their liability "to stick and cause delay and damage to the train." If when the train was inspected at Coalburg and the air brakes found in order, the inspector had cut any of them out, the car with such operable brakes cut out would still have been a power-braked car, and the law would have been violated by its subsequent movement. But, under the facts found, it was not the cutting out of the brakes on the six cars which made them inoperable, for they were already disabled and out of order without the company's fault. The cars had ceased to be "power-braked cars" before this happened; and not being power-braked, they could lawfully be moved even though their brakes were not and could not be used by the engineer.

The law is not ambiguous and contains sufficient evidence of its meaning within itself; and while there is no occasion to resort to other aid for its construction, if we do so, the result is the same.

In the brief below the government called attention to the fact that in the course of enacting the law of 1903,

a sub-committee of the Senate Committee on Interstate Commerce made a report (No. 1930, June 14, 1902, accompanying S. 3560) which disclosed that the pertinent language of Section 2 of the bill as it then stood was this:—

> "Sec. 2. That whenever, as provided for in said act, any car is equipped with train or power brakes the same shall be used and operated in every train in which such car is hauled."

This language makes equipment the sole test. If the brakes exist they must be used. But Congress abandoned it, substituting the provision for the "power-braked" car; and with the deliberate change of language doubtless intended a change of meaning.

It was argued below that the character of a car as to being "power-braked" or not can not change in the course of a journey, merely by its operable brakes becoming non-operable. Unless once a power-braked car always a power-braked car is the rule, it would seem that any defect arising in the appliances from ordinary use, making it impossible for the engineer to operate the train brakes, is precisely what would change the character of the car.

Again, the defendant could have lawfully run in each of its trains, three cars or even more, without train brakes. It is not perceived, nor does the record show, that there would be any greater danger from three cars with their air brakes inoperative than from three that never had been equipped with such brakes. Section 2 of the Act of April 14, 1910 (36 Stat. L. 298) requires that every car be equipped with an efficient hand-brake, and in this respect they would be on an equality.

True, the non-equipped cars would probably all be at the rear of the train where their hand brakes could be easily reached by the rear brakeman. However, they might be equipped with an air line, but no other air brake appliances, in which case there would be no reason for finding them in any particular location. The cars in question here were scattered irregularly through the trains.

If it be the law as decided in *United States vs. Great Northern Ry. Co.*, 229 Fed., 927, that hand brakes can not lawfully be used in connection with power brakes, then the comparative ease or difficulty of use of the hand brakes is of no consequence.

If hand brakes can legally be used, the irregular and scattered position of the cars in the trains should have no effect whatever on the meaning of the law or the guilt or innocence of the defendant. The cars were power-braked and associated with the others or not, according as they were or were not equipped with operable train brakes, and were or were not connected with the train line; and their position in the train had nothing to do with it.

In the unreported case of *United States vs. Carolina, Clinchfield & Ohio R. R. Co.*, which is understood to have been appealed, Mr. Justice Sanford, then Judge of the District Court, gives weight to the scattered position of the cars, not as bearing on the meaning to be ascribed to the law, but as showing that they were " 'associated together with' the eighty-five per centum of power-braked cars." With great respect it is submitted that association depends not on the position of the cars in the train, but on whether they are so arranged that the air line transmitting the power from the locomotive

reaches them as well as the eighty-five per cent. And that the opinion is in error in its assertion that upon defendant's construction, the clause providing that

> "all power-braked cars in such train which are associated together with said * * * per centum shall have their brakes used and operated,"

is practically superfluous. The fact that it compels use of all operable train brakes, as we attempt to show above, is overlooked. The opinion assumes, and we submit erroneously, that all cars equipped with air brakes are "power-braked cars," even though such brakes are inoperable. The term means in the second section of the Act of 1903, a car equipped as required in the first section of the Act of 1893, that is with *operable* power or train brakes. And it is only to such a car that the command that it shall have its brakes used and operated by the engineer, applies.

The government claims that its construction under which defendant was found guilty, will advance the purpose of the law, which as expressed by the title, is to promote the safety of employes and travellers.

That we deny. Such construction will require that a train fully equipped with power-braked cars, all brakes in perfect order when it leaves the terminal, be stopped and any car developing a brake defect set out either at the next siding or the next repair point. Air-brakes require expert attention and can not be repaired by the crew as a hot box can. The car will have to be switched out of the train. In the report of the Interstate Commerce Commission for 1920, quoted below by the government, it is said:—

> "It will be noted that air-brake defects continue to represent by far the most numerous class.

> Nearly fifty per cent. of all defects reported were to visible parts of air-brakes, more than 20,000 of these defects being found in but five parts. The number of cars with brakes cut out of service continues unduly large. Of the 22,375 air-brake defects reported, 7344, or nearly thirty-three per cent. of the whole number, were cut-out brakes."

We believe any competent railroad man will agree that, to say nothing of the delay to traffic, the stopping and switching of trains between terminals in order to relieve them of cars which develop air-brake defects *en route*, will endanger the trains and trainmen far more than the present practice of cutting out the defective brake and proceeding with the train.

The Interstate Commerce Commission states in some of its reports that the Act is to be construed as the government contends. And as it is the administrative body required to assist in the enforcement of the law, that opinion is to be considered. But its effect is much weakened by the fact that although alleged technical violations such as now claimed must have been without number, the prosecutions during all these years are exceedingly few. The Commission evidently has doubts as to its position.

There has been no general enforcement or attempted enforcement of the law as construed by the Commission; and it is believed that the defendant's practice is followed by all railroads. Opinions have been expressed, but no settled departmental *practice* corresponding to such opinions such as would be of any real aid in the construction of the law, is shown.

The opinions of the Courts are divided. In *United States vs. Baltimore & Ohio R. R. Co.*, 176 Fed. 114,

the same court in which the defendant was found guilty in the instant case, by another Judge, held that under similar circumstances, the railroad was not liable. It said:—

> "It is averred in plaintiff's statement of claim that while the train had seventy-five per cent. of its cars used and operated by the engineer, there were associated together in said train with said seventy-five per cent., four additional train-brake cars which did not have their brakes operated by the engineer. * * * It was admitted at the trial that said four cars were defective and out of repair. It did not appear how long the brakes had been unused. The testimony showed that they had their air 'cut out'—that is, cut off in the pipes extending in the main air line of the train to the brakes. The air was not interfered with in passing through said cars to other cars. It seems plain that with brakes cut out for defects they ceased to be power-braked cars and became part of the allowed percentage of hand-braked cars. The act nowhere imposes a penalty for using an air-braked car with a cut-out brake, as it does for using one with a defective coupler, or one without grab-irons or hand-holds."

To the same effect is *United States vs. Chesapeake & Ohio Ry. Co.*, 247 Fed. 49, to which the attention of the Court is especially directed. Speaking of the second clause of Section 2 of the Act of 1903 relating to "power-braked cars," the Court say, p. 51:—

> "This provision clearly indicates that it was the purpose of the Congress that the railroad companies might use power brake cars not associated with the 50 per cent. that the railroad was not required to have operated as 'power brake cars' in a workable condition."

And on p. 52:—

> "The Interstate Commerce Commission under authority conferred upon it by Congress has provided that in the making up of a train the railroad company must equip 85 per cent. of its cars with workable air brakes, and where the railroad, as in this instance, has fully complied with this requirement it is immaterial as to whether the remainder of the train is made up of cars equipped with cut out air brakes or the ordinary train brakes. We think it is contrary to common sense and justice to hold otherwise."

It will be noted that the brakes had been "cut out because defective and not in condition for use." So that the last paragraph is not too broad, as it would be if intended to apply to brakes cut out without cause.

The contrary view is expressed by the dissenting opinion by Knapp, J., which is approved by Mr. Justice Sanford in the unreported case mentioned *supra.*

We submit that this dissent is unsound, because it includes in the class of "power-braked cars" those whose air-brakes are defective and for that reason can not be used by the engineer.

It makes no allusion to the inherent meaning of "power-braked," or to the evident intent that the term shall be taken to mean just what the language defining usable cars found in Section 1 of the Act of March 2, 1893, means; nor to the change of terms made by amendment of the bill. In the last analysis the dissent is based on the theory once a power-braked car, always a power-braked car, regardless of the condition of the brakes.

The cases of *Pennsylvania Co. vs. United States,* 241 Fed., 824, and *B. & O. S. W. Ry. Co. vs. United States,* 242 Fed. 420, cited by Judge Knapp do not apply.

In the former at page 827, in connection with violations of the automatic coupler provisions of the law, attention is directed to the fact that Section 5 of the Act of 1910 forbids the movement of such defective cars to repair points, otherwise than within the express limitations of Section 4.

But Section 5 relates to cars with "penalty defects," defects or omissions forbidden by statute, and not to any other defective condition. The only requirement of the law that cars be equipped with air brakes relates to those cars composing the minimum percentage in a train, or those "power-braked cars associated together with" such percentage. As the six cars in question here were in neither class, their movement was not forbidden by Section 5.

It further appeared in the cited case that none of the thirty-three cars and caboose which made up the train were coupled with the air hose. This made out a clear violation of the train brake provisions of Section 1 of the Act of 1893 and of the first clause of Section 2 of the Act of 1903. But the second clause was not involved.

The second of the above cited decisions also related to the movement to a repair point of a car having a penalty defect, a defective draw-bar, and is equally inapplicable.

Some other cases were referred to below by the government, but as it claims that Judge Knapp's dissenting opinion fully and correctly states its theory of this case, it is not necessary to discuss them, except to call attention to the unreported case of *United States vs. Great Northern Ry. Co.*, which was cited by the government below as the last decision on the question.

It is distinguished from the case at bar. The offense related to the twenty-ninth car in the train, which for some reason unexplained, had its air-brakes cut out. It did not appear but that this was done without any reason and simply to avoid using them. In the instant case the brakes were not cut out until after they had become inoperable. The court, Bourquin, J., held in the *Great Northern* case that cutting out the brakes without some justification, was unlawful.

> "Otherwise, if excess power-braked cars can be directly joined to the eighty-five per cent., but the air cut off as in the instant case and the statute not violated, it converts the statute's command into an option—into an obviously senseless direction to 'use the power-brakes on the excess cars if you use them.'"

The construction defendant contends for will prevent any optional use of operative brakes on cars which are either in the minimum percentage or are associated therewith. And a carrier seeking to justify its use of a car having inoperable brakes will have the burden of showing, if they are cut out, that this was done after they became inoperable, and that eighty-five per cent. with operable brakes remained.

Judge Bourquin recognized that disablement may be important, saying:—

> "Whether or not disabled excess power-braked cars associated together with the eighty-five per cent. are a violation of the statute may depend upon the nature of the disablement. It may be so great as to exclude them from the category of 'power-braked' cars."

In the instant case the disability was complete. (See Finding of Facts.)

II.

It Was Not Unlawful for the Defendant's Trains to Carry Three Cars Each, with Air Brakes which Became Out of Order in Transit, Past Erie, Pa., a Repair Point.

Bringing the question of the legality of the movements beyond a repair point into the case is a concession by the government that the cars properly moved to that point. And, under the facts found, there can be no doubt of the legality of the movements to Erie. For even if the cars were defective, it is shown that they were properly equipped before the trains started, and that the defects arose during use, so that under the proviso contained in Section 4 of the Act of April 14, 1910, *supra*, they could be taken to Erie for repair without liability for penalties.

But the defendant's contention is that the cars were not defective in any manner forbidden by statute. The law does not prohibit the movement of *every* car which is not equipped with air brakes, as it does the movement of cars without automatic couplers, hand-holds, or grab-irons. The train brake features of the Acts are intended to secure a safe train rather than safe cars, and they imply that a train may be safe and still carry fifteen per cent. of non-air-braked equipment. To increase the factor of safety by making certain that all air brakes which are capable of use shall be employed, the clause in Section 2 of the Act of 1903, which is discussed above, was enacted. But it does not require that all cars in excess of the eighty-five per cent. shall be equipped with train brakes. It deals only with "power-braked cars" which are associated together with the eighty-five per cent. And if, as we contend, the six

cars in question here were not "power-braked cars" within the meaning of the clause, then there is no other statute making them defective cars which could lawfully be carried to Erie, but not beyond.

That the question propounded should be answered in the affirmative is

Respectfully submitted,

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